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Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM 1997

DAVID L. McLELAND, an individual,

Petitioner,

v.

SYNCOR INTERNATIONAL CORPORATION, a Delaware corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the circuit court of appeals incorrectly conclude that the arbitration award was enforceable even though it was the product of an ex parte proceeding?

2. Did the circuit court of appeals improperly approve enforcement by the district court of the ex parte arbitration award even though petitioner strongly protested the arbitrability issue in that proceeding, and no judicial order compelling arbitration was ever entered?

PARTIES TO THE PROCEEDINGS

Petitioner David L. McLeland ("petitioner"), is a former employee of respondent Syncor International Corporation. He worked for Syncor for roughly ten years in various capacities, including a period as a Pharmacy Manager.

Respondent Syncor International Corporation ("respondent"), manufactures and distributes nuclear pharmaceuticals, operates a number of nuclear pharmacies, and also sells related services and products.

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Petition for Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner David L. McLeland hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The district court's Order (Appendix ["App."]) J, filed on August 19, 1996, denied petitioner's New Trial Motion (App. H). That New Trial Motion was in turn filed in response to the district court's Memorandum Opinion (App. B), and Judgment Order (App. C), filed on March 29, 1996, which had granted respondent's Motion to enforce the final award (App.

G). In an Opinion (App. A), dated August 11, 1997, the United States Court of Appeals for the Fourth Circuit affirmed the district court Order.

JURISDICTION

On appeal from the United States District Court for the Southern District of West Virginia, the United States Court of Appeals for the Fourth Circuit Court of Appeals issued its Opinion (App. A), denying petitioner's appeal; the Opinion is dated August 11, 1997. This petition is accordingly filed within the time allowed by law. Supreme Court Rules 13.1, 13.4. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1), 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 9 U.S.C. § 9 provides in pertinent part that:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply with is not in issue, the court shall make an order directing the parties to proceed in accordance with the terms of the agreement . . .

STATEMENT OF THE CASE

Respondent owns and operates a number of nuclear pharmacies across the United States; such pharmacies sell radioactive isotopes for purposes of both diagnosis and therapy. Petitioner was a Syncor employee for more than ten years. His employment was governed by a number of agreements with his employer; among them was a Director/Manager Employment Agreement ("Agreement")(App. K). According to this Agreement, petitioner was to be bound by an Invention, Secrecy & Other Matters Agreement, one of which he had executed in 1990, and a second of which he subsequently executed in 1995. The Agreement in addition contemplated an unexecuted Consulting Agreement Option, under which respondent enjoyed "the irrevocable option" to engage petitioner's services as a consultant.

Under this Agreement, petitioner served first as Midwest Regional Manager with responsibilities for respondent's Huntington, West Virginia office, and from March 18, 1994 until the end of that year as an Operations Analyst For respondent. Pursuant to a letter dated November 28, 1994, however, petitioner was told he was to be terminated "for business reasons" as of December 31, 1994. Petitioner subsequently entered into an Agreement and Release with respondent, which agreement granted petitioner an additional twelve weeks of severance pay in exchange for certain promises granted to respondent under that document. These twelve weeks were in addition to the ten weeks granted to employees in petitioner's position under respondent's normal policy.

Petitioner's departure from respondent's employment was extremely short-lived, however; he was temporarily rehired as a relief pharmacist in the corporation's Memphis, Tennessee

office. Petitioner continued in this position until about March 1, 1995. As a condition for obtaining this temporary position, however, petitioner was required to execute an Arbitration Agreement (App. O). This agreement provided inter alia at App. O-1 as follows:

> In the event (a) Employee disagrees with an Employer decision involving Employee's compensation, position or other conditions of employment or (b) if a dispute arises out of the separation from employment of Employee by Employer then first efforts to resolve the disagreement or dispute shall be according to the problem solving procedure in the Employer's Employee Handbook. If such disagreement or dispute is not resolved by such problem solving procedures, then it shall be resolved by binding arbitration, at the request of either party, In (sic) accordance with the rules of the American Arbitration Association . . . The arbitrator shall have the power to award only actual direct compensatory damages which excludes punitive damages, and the parties waive the right to recover punitive damages . . . The arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated by judicial review for any such error.

Around the time of petitioner's November 1994 termination, he "became interested in establishing a nuclear pharmacy in the Beckley/Princeton, West Virginia area" (Memorandum Opinion at 2; App. B at B-2). To that end, petitioner entered into discussions in October 1994 about the venture with respondent's executives Wade Hopkins and Jim Stone. Respondent, as a result, was fully aware of petitioner's plans in this direction. The business was in fact incorporated

under West Virginia law on January 31, 1995 as Princeton Diagnostic Isotopes, Inc. ("PDI").

Respondent claims to have learned about the existence of PDI only sometime in February 1995. In fact, this is simply not the case; even the Arbitrator's Final Award Including Factual Findings And The Reasons on Which the Decision is Based ("Final Award")(App. M), reveals that the corporation learned of the plans to create PDI much earlier, i.e., as early as October 1994. In any event, complicated (but fruitless) negotiations were undertaken between the parties to effect a deal under which respondent would have purchased PDI; however, the deal was never consummated and so the dispute was never resolved (Memorandum Opinion at 2; App B. at B-2). See Complaint ¶¶ 15-20, (App D. at D-4 to -5), for some of the alleged details of the so-called negotiations.

Notwithstanding, on March 30, 1995 respondent exercised its option to engage petitioner's services as a consultant (Complaint ¶ 23; App. D at D-6). Accordingly, respondent sent to petitioner a Consulting Agreement (App. L), which, respondent claims, petitioner neither executed nor returned (Complaint ¶ 24; App. D at D-6).

Respondent then demanded arbitration between the parties on May 18, 1995 (Complaint ¶ 27; App. D at D-7). As respondent admitted in its Complaint, however, even before that pleading was filed, "McLeland, through counsel, has denied the validity and applicability of the arbitration agreement, and declined to participate" (Complaint ¶ 28; App. D at D-7). To that extent, the district court finding that "McLeland did not respond" to the demand to arbitrate (Memorandum Opinion at 2; App. B at B-2), obviously tells much less than the full story. Notwithstanding, the American Arbitration Association

("AAA"), sent the parties a letter dated May 23, 1995 ("AAA Letter")(App. P), setting out the facts of the arbitration demand and the details of the proposed arbitration. Among its provisions, was a paragraph setting out the manner of choosing an arbitrator (AAA Letter ¶ 4; App. P at P-2). The parties were presented with a list of arbitrators, from which each could strike up to three names. If the process failed to produce a mutually acceptable arbitrator, then "the AAA will proceed to an administrative appointment of the arbitrator" (AAA Letter ¶ 4; App. P at P-2). The point, in any event, is that both parties were jointly to select the arbitrator even though, because petitioner did not participate in the arbitration proceeding in any fashion, he did not help to choose the arbitrator in fact. It is therefore believed that respondent rather then the AAA chose the arbitrator. The AAA subsequently issued a notice to the parties on July 12, 1995 which set an arbitration hearing date of August 21, 1995 (Final Award at 1; App. M at M-1).

On August 2, 1995, however, respondent filed its Complaint and Petition to Compel Arbitration (App. D); this pleading was obviously filed before the arbitration was scheduled to be heard. Petitioner's answer to the Complaint was scheduled to be filed on or before August 23, 1995; his Answer and Counterclaim (App. E), which was dated August 21, 1995, was therefore timely filed in the trial court on August 23, 1995. In this Answer and Counterclaim, petitioner specifically "denie[d] the validity and applicability of arbitration to the facts of this matter" (Answer and Counterclaim ¶ 28; App E. at E-4), a denial which was an effective contention, made before the actual arbitration and within a judicial context, that the dispute was not arbitrable.

Notwithstanding, the arbitration took place on August 21, 1994. See Final Award (App. M). It was held without

McLeland's participation (Final Award at 1; App. M at M-1); hence, the arbitration proceeded ex parte (Memorandum Order at 2; App. B at B-2). A Final Award (including an Award of relief), was then, of course, issued on September 29, 1995 (Final Award at 1; App. M at M-1; Memorandum Order at 2; App B. at B-2).

Respondent then filed its Complaint and Petition to Compel Arbitration (App D.). Petitioner, in response, filed his answer and counterclaim on August 23, 1995 (App. E). Respondent filed its answer to the counterclaim and its own counterclaim on September 21, 1995 (App. F). Petitioner in turn filed his answer to the respondent's counterclaim on October 3, 1995 (App. G). Respondent thereupon filed its Motion to Enforce Arbitrator's Final Award ("Motion")(App. H), on October 17, 1995. After a hearing on the Motion on March 12, 1996, the trial judge filed its Memorandum Opinion (App. B), and Judgment Order (App. C), on March 29, 1996, granting the Motion to enforce the final award.

On April 8, 1996, Petitioner moved for a new trial and to set aside the Judgment (App. I). The trial court filed an Order (App. J), on August 19, 1996; inter alia, the Order denied the motion for a new trial. Petitioner thereupon filed his notice of appeal on September 13, 1996. After an exchange of briefs and oral argument, the Fourth Circuit Court of Appeals affirmed the district court disposition of the case (App. A). Petitioner now submits this Petition in response to that appellate action.

REASONS FOR GRANTING THE PETITION

1. **This case presents a significant and widely debated issue as to whether an ex parte arbitration award can be**

enforced when the arbitrator was contractually bound to be chosen by both the parties but in fact only one of the parties participated in the selection process. As all parties agree, the Arbitration Award in this case was clearly the product of an ex parte proceeding (Opinion at 5; App. A at A-5), a fact as to which petitioner has strenuously objected at every stage of this dispute. Both the circuit court of appeals and the district court were untroubled by this fact because, or so the district judge found, AAA "rules provide for an arbitration hearing to proceed ex parte, if a party who has received proper notice does not participate in the hearing" (Memorandum Opinion at 5-6; App. B at B-5). The circuit court of appeals quoted this language and concluded that "[t]his conclusion is correct" (Opinion at 5; App. A at A-6). The appellate court then cited and quoted the decision in Sheet Metal Workers International Association Local Union v. Power City Plumbing & Heating, Inc., 934 F.2d 557, 561 (4th Cir. 1991), for the proposition that "if the opposing party was served with proper notice and was aware of the arbitration proceedings, "[t]he arbitration award is valid and fully enforceable despite [that party's] absence'" (Opinion at 6; App. A at A-7).

Power City does not speak to the issue at hand, however, because, from bare words of the opinion, it appears that the arbitration in that decision was of a type, as characterized by the circuit court of appeals in this case, in which "the arbitrator is either pre-selected or joint selection is not necessary" (Opinion at 6; App. A. at A-7). The present case, by contrast, is of a type, again in the words of circuit court of appeal, in which "the arbitrator is to be jointly selected by the parties" (id.; App. A. at A-7).

What, then, if there is no joint selection at all, i.e., what happens if, as in the case at hand, the parties to the dispute do not jointly take part in the selection process as the arbitration agreement seems to contemplate? In that regard, the court of

appeals noted the AAA rules providing that "[u]nless the law provides to the contrary, the arbitration may proceed in the absence of any party . . . who, after due notice, fails to be present" (AAA, Employment Dispute Resolution Rules, Rule No. 18 (effective November 1, 1993))(App. T)(emphasis supplied)("AAA Rules"). However, as Petitioner pointed out in the court below, under the Arbitration Agreement into which the parties entered, the law does "provide[] to the contrary"; hence, he argued, the ex parte arbitration hearing was improper and could not have served as the valid basis for an Order and Judgment enforcing the Final Award, let alone for its approval by the appellate court on appeal.

As noted above, the Arbitration Agreement stipulated the applicability of "the rules of the American Arbitration Association" (App. O). These rules in turn provide in App. T at T-1, as follows:

> [T]he AAA shall send simultaneously to each party to the dispute an identical list of names of persons chosen from the panel . . .Each party to the dispute shall have 10 days from the transmittal date in which to strike any names objected to, number the remaining names in order of preference, and return the list to the AAA . . . If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite that acceptance of an arbitrator to serve.

Under Petitioner's view, the proper analysis of this procedure in cases where one of the parties does not participate in the selection process is found in Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, 834 F.2d 751, 754

(9th Cir. 1987), cert. denied, 486 U.S. 1043, as amended, 856 F.2d 1772 (9th Cir. 1988), as follows:

> [T]he general trend of authority is clear. Under a collective bargaining agreement specifically providing for designation of an arbitrator without the participation of both parties, an arbitrator may issue an enforceable default award when one party fails to attend the hearing. If an agreement provides that the parties shall jointly select an arbitrator, however, a court may refuse to enforce an award made following an ex parte hearing before an arbitrator selected without the defaulting party's cooperation, on the grounds that the party not in default should have sued to compel arbitration.

(Citations omitted)(emphasis supplied).

The present situation obviously fits comfortably within Toyota of Berkeley's second class, i.e., one in which a joint selection process is mandated. The arbitrator was to be chosen through the joint efforts of petitioner and respondent, in contrast to alternative procedure in which the arbitrator is typically chosen without such joint efforts. Cf. New England Mechanical, Inc. v. Laborers Local Union 294, 909 F.2d 1339, 1346 n. 5 (9th Cir. 1990)("Ex parte arbitration is allowed when the parties have agreed to designate an arbitrator in advance of any dispute"); Sheet Metal Workers, Local 162 v. Jason Manufacturing, Inc., 900 F.2d 1392, 1398 (9th Cir. 1990) (same; citing Toyota of Berkeley). Under those conditions, the circuit court of appeals should have refused to approve the district court's enforcement of the Final Award but should

instead have continued its adjudication of the Complaint to compel arbitration.[1]

In their refusal to condemn the ex parte nature of the Final Award, neither court below analyzed the matter in the depth it deserved. As noted above, the circuit court of appeals simply relied on the statement in Sheet Metal Workers International Association, Local No. 33 v. Power City Plumbing & Heating, Inc., supra, 934 F.2d at 561, that, assuming the existence of notice and knowledge, an ex parte arbitration is enforceable. The problem with this analysis is that there is nothing whatever in the Power City decision that reveals whether that case fell within the first or second of the two Toyota of Berkeley classes. As a result, it is impossibleto tell if Power City is relevant to this case or not.[2]

Under the circumstances, petitioner urges the Court to follow "the general trend of authority," Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, supra, 834 F.2d at 754, and find that the court of appeals should have disapproved the district court's decision not to adjudicate the Complaint to compel arbitration to final judgment but instead to grant respondent's motion to enforce the Final Award.

The circuit court of appeals dealt with Toyota of Berkeley by purporting not to "express[] any opinion on the merits of the Ninth Circuit's rule" (Opinion at 6; App. A at A-7). Instead it offered three reasons why, in its view, Toyota of Berkeley did not apply at all. Petitioner submits that the Court

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[1] The very fact that respondent filed its complaint to compel arbitration some weeks before the arbitration was actually held suggests that the corporation was well aware of the rules in this regard.

[2] Of course, if Powers City is relevant, petitioner's view is simply that both that decision and the more recent disposition of the case at hand by the fourth circuit, are equally wrong.

should find all of these reasons unconvincing, and conclude instead that this case fits squarely within the Toyota of Berkeley paradigm.

First, the court asserted that "AAA rules provide only for joint input, not joint selection" (Opinion at 7; App. A at A-8). In Petitioner's view, however, this takes an unduly blinkered view of the selection process. The record in this case is silent as to how many names were actually submitted to the parties as candidate-arbitrators. However, each party had the right to disapprove of certain names, as well as to list the remaining names in order of preference; thus, the "joint input" in this case could clearly be a first cousin of "joint selection" at the very least. In any case, it is the right of participation in the "joint selection" process (as opposed to situations in which the parties are simply presented with their arbitrator with no right of selection input whatever), which triggers the Toyota of Berkeley test. The present case is, in short, clearly a case in which "the parties shall jointly select an arbitrator." Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, supra, 834 F.2d at 754. See generally, F. Elkouri & E. Elkouri, How Arbitration Works 245-46 (Bureau of National Affairs 4th ed. 1985 & Supp. 1988)("Elkouri"); 1 Gabriel M. Wilner, Domke on Commercial Arbitration, § 20.02 at 308 (Clark Boardman Callaghan rev. ed. 1984)("Domke"). As a result, an ex parte resolution of the case was improper.

Second, the circuit court of appeals suggested that the fact the arbitration can proceed if even if "a party does not return the list within the time specified" (AAA Rules 18; App. T at T-1), serves as a rule-based provision for ex parte arbitrations (Opinion at 7; App. A. at A-8). In fact, the selection provisions in the rule do nothing of the sort. All that the so-called "default" selection process provides is that the arbitrator can be named even if a party does not particulate in that process. That is, if the parties fail to return their lists in a timely

fashion, then, assuming all parties appear at the hearing, the arbitration proceedings can take place with the "default" arbitrator so chosen. The rule cannot be stretched so far as to entail that an actual ex parte arbitration can then take place merely because the lists were not returned. Indeed, under the rationale of the circuit court of appeals, if neither party submitted its list or even showed up at the arbitration hearing, the arbitrator could then conduct an arbitration in the absence of both parties. Merely to state such a proposition is clearly sufficient to refute it. The proper analysis factors in the proviso in the AAA rules authorizing ex parte hearings "[u]nless the law provides to the contrary" (AAA Rules 18; App. T at T-1).[3]

Here, as Toyota of Berkeley plainly entails, the law is "to the contrary." Hence, prosecution in the district court of the action to compel arbitration was the proper--and only--road this dispute should have taken.

Third, the court of appeals suggests that Petitioner's objection is not with the ex parte nature of the arbitration but with the "arbitrator that was actually selected" (Opinion at 7; App. A. at A-8). As the court framed this analysis:

> McLeland's objection more properly concerns the arbitrator that was actually selected; insofar as he complains about being deprived of his strikes, the issue is whether the arbitrator who conducted the arbitration

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[3] Of equal relevance is the arbitration Code of Professional Responsibility, which provides inter alia as follows:

1. In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances.

Id. § V(C)(1), 64 L.A. 1317, 1326 (1975).

> was biased, McLeland has made no such claim, however, and has never objected to the choice of arbitrator. By his own admission he not prejudiced by his failure to participate in the selection of the arbitrator.

(Opinion at 7; App. A. at A-8 to -9). This rationale for the decision below constitutes question-begging on a wholesale scale. It is equivalent to saying that if a citizen is illegally denied the vote, the denial is unimportant so long as the candidate the voter favored was actually elected. Needless to say, petitioner disagrees with the results of the arbitration; by parity of logic, he objects to the identity of the arbitrator who was chosen to arbitrate the dispute. But this objection is hardly inconsistent with Petitioner's parallel--and more relevant--objection, in light of the selection process, to the holding of any ex parte arbitration at all, regardless of the identity of the arbitrator actually chosen, and notwithstanding the actual outcome of the proceedings. In short, therefore, the circuit court of appeals' justification of not reaching a result consistent with the reasoning in Toyota of Berkeley is notably unconvincing, and justifies a grant of the writ here sought.

It is settled that a writ of certiorari can issue from this Court to resolve conflicts among the federal circuit courts of appeals on questions of importance to the body of federal jurisprudence. See Supreme Court Rule 10(a); Calhoon v. Harvey, 379 U.S. 134, 137 (1964)("Because of the importance of the question presented and conflicting views in the courts of appeals and the district courts, we granted certiorari"); 23 James William Moore, Moore's Federal Practice § 510.21 at 510-14 (Matthew Bender 3rd ed. 1997). Petitioner has alleged and documented just such a conflict between the ninth (Toyota of Berkeley), and fourth circuits (the case at hand), on the important issue of when, under both the rules of the AAA and federal arbitration law, ex parte arbitrations are proper and their results enforceable. But the inter-circuit conflict is not confined to

these two circuits; the fifth circuit also follows a rule which, although it arose under somewhat different facts, is consistent with that of the ninth circuit, and at odds with the one that is the subject of the Petition at hand. For that reason, the justification for issuance of the Writ becomes, in Petitioner's view, even more compelling.

The case of Sam Kane Packing Co. v. Amalgamated Meat Cutters, 477 F.2d 1128, 1136 (5th Cir.) cert. denied, 414 U.S. 1001 (1973), also involved a situation in which one of the parties declined to participate in either the arbitrator selection process or in the ultimate arbitration itself. The company "consistently took the position that the dispute in this case was not arbitrable under the contract." 477 F.2d at 1135. An attorney for the company was in fact one of the arbitrators named; the union nominated a second member of the panel and those two members were to chose a "neutral" third member, who would, under the realities of the situation, be the tie-breaker. The company refused to take part in the selection process, whereupon a single party arbitration--conducted by the union-chosen arbitrator--was held. Naturally, the union position was adopted, and the district court then enforced the award.

The fifth circuit disapproved on the ground that ex parte arbitration represented a "harsh policy" that was inappropriate under the circumstances. Id. at 1136. It is true that the court so held because the matter involved the choice of a third panel member, not the selection of the initial members thereof. Indeed, the court went so far as to state that if the company had refused to name any arbitrator at all, or if the union had simply picked a name off the list of neutrals, an ex parte proceeding might have been enforceable. Id. & n. 3 (dictum).

The point of this analysis is that the "harsh penalty" of ex parte dispute resolution should be implemented only if the

object of the remedy has failed to take substantial steps with respect to the arbitration--either by way of participation or in seeking to forestall it. In the present case, it is clear that petitioner took many steps to deal with the immanency of the arbitration proceedings by participating fully in the action filed by respondent to compel arbitration. As such, Petitioner's actions are functionally identical to the act of the company in Sam Kane in first naming its own arbitrator but in then declining to participate in the completion of the panel, and then in the actual arbitration itself.[4]

The court in Sam Kane therefore held that, under the circumstances, "the union should have sought an order from the district court compelling the company to follow the contractually agreed-to procedures." See generally, Elkouri, supra at 247-48; 1 Domke § 18.01 at 18-3 (Clark Boardman Callaghan rev. ed. 1995).

This is, needless to say, precisely what respondent did quite early in this dispute, only to opt instead for the ex parte arbitration route as the actual date of the arbitration drew nigh. Petitioner suggests that the respondent's first instincts were correct; it should have continued pursuing that remedy. As this

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[4] Although the focus in the Petition is upon the split among the fourth, fifth, and ninth circuits, one notes that, under circumstances similar to those in Sam Kane or Toyota of Berkeley, a number of state courts have declined to enforce ex parte awards on the ground that the participating party should have sought an order compelling arbitration in state court. See, e.g., Fuller v. Pepsi-Cola Bottling Co., 406 S.W.2d 416, 4`8 (Ky. 1996); In re Masters, Mates and Pilots, 52 L.R.R.M. 2392 (N.Y. Sup. Ct. 1963). Cf. A.B.C. Cartage & Trucking Co., 42 L.A. 55 (1963, Whelan)(arbitrator refused to proceed with ex parte arbitration absent clear direction to the contrary under state law or AAA rules).

Court has noted, it is a "first principle . . . that 'arbitration is a matter of contract[.]'" AT & T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 648 (1986), quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). See also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 944 (1995)(same). See generally, Elkouri, supra at 247-48; 1 Domke § 5.00 at 47 (Clark Boardman Callaghan rev. ed. 1984). Under the contract between the parties (which incorporates the AAA rules; see generally, 1 Domke § 7.01 at 81 (Clark Boardman Callaghan rev. ed. 1984)), petitioner's refusal to take part in the selection process, should under prevailing law have limited respondent to its legal remedy, if any, to compel arbitration. Because the court of appeals, contrary to better considered authority from the fifth and ninth circuits, held to the contrary, petitioner submits that a writ of certiorari to that court to resolve this important issue of arbitration law is appropriate.

2. **This case presents to the Court an undecided issue under the Federal Arbitration Act concerning the question of whether a federal district court can enforce an arbitration award when (a) an individual contests the arbitrability of a dispute prior to the arbitration; (b) the arbitration agreement does not give the arbitrator the authority or the jurisdiction to decide the arbitrability issue; and (c) the other party conducts an ex parte arbitration without first obtaining an order to arbitrate the dispute.** It is a black letter principle of arbitration law that whether a particular dispute is arbitrable or not is a legal question for the court. AT & T Technologies, Inc. v. Communication Workers of America, supra, 475 U.S. at 649. What this principle means is that arbitrability is most commonly a question of law for the court. General Drivers & Helpers Union, Local No. 554 v. Mid-Continent Bottlers, Inc. (Omaha Division), 767 F.2d 482, 484 (8th Cir.)("A party's assent to arbitration, as a matter of contract

construction, is a question of law for the court"), cert. denied, 474 U.S. 947 (1985); Darr v. Blevins, 864 F. Supp. 27, 29 (E.D. Mich. 1994)("[I]t is a matter of law for the Court to interpret the provisions of the arbitration agreement and determine the scope of claims submissible to arbitration").

The Arbitration Agreement says nothing whatever about the arbitrability of the question of whether the actual dispute decided by the arbitrator was, in fact, arbitrable. It is true that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakab[e] evidence that they did so.'" First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 944, quoting AT & T Technologies, Inc. v. Communication Workers of America, supra, 475 U.S. at 649. The test to be applied flows from "ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 944. As the Court noted in this regard, the inquiry is "whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration." Id. An examination of the present Arbitration Agreement reveals no "'clea[r] and unmistakab[e] evidence,'" id., whatever on the point in either direction. The question thus became one of law for the court below to determine.

Silence on the issue, however, gives rise to an presumption in favor of the exclusivity of judicial disposition of the arbitrability question, as the Court took pains to point out in its decision in Kaplan:

> [T]he law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" --for in respect to this latter question the law reverses the presumption.

First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 944-945 (emphasis by the Court).

Although the Arbitration Agreement was silent on the issue, petitioner most certainly was not; he put the issue into play in his Answer over a month before the Final Award was even issued. In addition, respondent had been informed before it ever filed its Complaint to compel arbitration that petitioner objected to the undertaking in the strongest possible terms (Complaint ¶ 28; App. D at D-7). See also the June 7, 1995 letter from petitioner's counsel to the AAA (App. S at S-1)("On behalf of David McLeland, we do not submit to arbitration and have not agreed to arbitration"), which also made the point in the strongest terms. What is more, the issue was also implicitly put into controversy by respondent in its filing of a Complaint to compel arbitration, which was filed almost a month before the arbitration hearing was held. As a result, the district court's statement that petitioner "never raised this issue with the court" (Memorandum Opinion at 7 n. 2; App. B at B-6)--an assertion with which the circuit court of appeals necessarily had to agree in order to affirm the lower court's disposition of the case--simply does not square with the procedural or factual history of this litigation.

Because he objected to the arbitrability of the dispute, petitioner was then faced with the problem of what to do about it. Given the near certainty that the Arbitration Agreement did not provide for resolution of the arbitrability question by the arbitrator himself, petitioner was faced with a number of unpleasant, and probably unavailing, possibilities. The Court in Kaplan acknowledged and sketched two of those possibilities:

> 1 First Options makes several counterarguments: (1) that the Kaplans had other ways to get an independent court decision on the question of arbitrability without arguing the issue to the arbitrators (e.g., by

> trying to enjoin the arbitration, or by refusing to participate in the arbitration and then defending against a court petition First Options would have brought to compel arbitration.

514 U.S. at 946. In the event, petitioner did refuse to participate, and respondent did seek to compel arbitration, as was its right under the Federal Arbitration Act, 9 U.S.C. § 4.[5]

Up to this point, the case at hand had faithfully followed the Kaplan script; the prospect was that the Complaint and Petition to Compel Arbitration (App. D), would be adjudicated, its outcome the product of a judicial consideration of the merits of each party's arguments on the arbitrability issue. In fact, however, the Kaplan script was abandoned because the arbitration was held ex parte notwithstanding the fact that this complaint to compel arbitration was still pending when the arbitration was held and the Final Award issued.

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[5] The question of whether the parties had agreed to arbitrate arbitrability was, as a result, effectively still before the court and undecided when the district judge addressed the motion seeking to enforce the Final Award. Petitioner had therefore been justified in not participating in the arbitration because this issue of law for the court had never been addressed by the trial judge before the arbitration took place. Because it was not decided at that time, it surely should have been addressed before the Final Award itself was enforced, as the Kaplan case plainly requires. The decision below is fundamentally flawed, therefore, because the threshold legal question of whether the parties had agreed to arbitrate arbitrability remains undecided to this day. That alone should have been sufficient to dictate a reversal of the district court on appeal; that it did not requires a disapproval of the failure by the circuit court of appeals to do so itself.

The present case therefore involved a possibility with which the Court was not concerned in Kaplan. What if, as was the case in both Kaplan and the present litigation, it "cannot [be] show[n] that the [parties] clearly agreed to have the arbitrators decide . . . the question of arbitrability," 514 U.S. at 946, but, as is the case here but was not in Kaplan, the arbitration is held notwithstanding one party's refusal to participate--which decidedly was not the case in Kaplan but was petitioner's course of action in the case at hand. Under such circumstances, petitioner was forced to roll the dice; he could either participate in the arbitration, which act would violate his contention that the dispute was not arbitrable and lead to all sorts of tactical and strategic difficulties in the process. Or petitioner could refuse to participate at all, thereby chancing an unfavorable ex parte award which, given the extraordinarily limited scope of judicial review of such awards, see First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 942 ("the court will set that decision aside only in very unusual circumstances"); United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36-37 (1987); AT & T Technologies, Inc. v. Communication Workers of America, supra, 475 U.S. at 649-650, would force him in turn to run the risk of losing the war simply through the loss of a preliminary skirmish. Particularly where "there is no strong arbitration-related policy favoring" the arbitrability of the arbitrability question, First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 947, neither Kaplan nor federal arbitration law can be said to demand that he run that risk.

One would expect respondent at this point to observe that petitioner could, under the circumstances, have filed for an injunction to stay the arbitration. In fact, however, the legal deck was heavily stacked against any such attempt. In the first place, the Federal Arbitration Act does not place the burden of seeking a stay of an arbitration on the party contesting an

arbitration. In fact, the Act does not even provide a mechanism for such a contest. By contrast, the Act explicitly provides a statutory vehicle for the party seeking to compel arbitration. See 9 U.S.C. § 4. Thus, the statutory scheme that constitutes the playing field in this matter is seen to be heavily tilted in respondent's favor. Such a structural bias, petitioner contends, is neither demanded by, nor justified under, settled principles of federal arbitration law.

This is not to say that petitioner could not have sought such relief nonetheless. Yet, and in the second place, as a leading commentator observes, "[s]tays of arbitration pending appeal are exceptionally hard to get, making casual or reflexive requests presumptively grounds for sanctions." 1 Domke, supra, § 18.07 at 18-19 (Clark Boardman Callaghan rev. ed. 1995). This means that a party in respondent's position is free either to seek to compel arbitration or simply to go ahead with the arbitration. The worst that could happen to it is a judicial finding that the dispute was not arbitrable, whereupon the parties would simply return to square one. From petitioner's point of view, however, his best possible result is respondent's worst result, i.e., a finding that the dispute was not arbitrable. His worst result would be an unfavorable ex parte award to whose creation he would not have contributed, and which, given the ex parte nature of the process that created it, was likely to be unfavorable.

The logic of this argument can be viewed from another perspective. Whether or not the arbitrator has the contractually-granted power to arbitrate the question of arbitrability, it is clear as a practical matter that he must decide the arbitrability question (if it is raised by one of the parties) at least implicitly, or not conduct the arbitration at all. Yet the Court in the Kaplan case made it clear that when the parties have not agreed to arbitrate the arbitrability issue, the law reverses the presumption that normally operates in favor of arbitration to a presump-

tion against the arbitrability of the arbitrability question. 514 U.S. at 944-945. However, if a party is allowed to circumvent the necessity of compelling arbitration under 9 U.S.C. § 4 by holding an ex parte arbitration instead, then in practical terms at least, he has been able to reverse the presumption as to the arbitrability of the arbitrability question which the Court had formally resolved against him in Kaplan.

That is, the Court decided in Kaplan that for an arbitrator to have authority to decide the arbitrability issue, he must draw that authority from the contract itself, employing "ordinary state-law principles that govern the formation of contracts." 514 U.S. at 944. Thus, the Arbitration Agreement would have had unmistakenly to grant him that authority for the arbitrator explicitly to be authorized to decide that issue. Id. In the instant case the Arbitration Agreement was drafted by respondent and does not address the arbitrability issue at all. But by being able to hold an ex parte arbitration absent "'clea[r] and unmistakabl[e] evidence,'" id., giving the arbitrator the power to decide the arbitrability issue, respondent has benefitted as if the presumption did favor him.

The effect of the decision below therefore frustrates the Court's goals in Kaplan. This fact entails in turn that the Court should, in line with the considerations set out in Supreme Court Rule 10(c), grant certiorari in this case to deal with this issue as one left open (but needing resolution) on account of the differing facts in issue in Kaplan. See generally, 23 Moore's Federal Practice § 510.41 at 510-27, § 510.44 at 510-39. This Court has not dealt with the issue of whether, when an arbitration agreement is silent on the issue of "the 'who' question," 514 U.S. at 943, but one of the parties to the contract asserts the non-arbitrability of the dispute, the party seeking arbitration is free to bypass the need to file suit to compel arbitration, and simply hold an ex parte proceeding. The question is important to the body of arbitral jurisprudence because judicial approval

of the procedures actually taken in this case would upset the balance of presumptions so carefully crafted in Kaplan. In addition, the process followed in this case allows a party like respondent to avoid as well carrying the burden, clearly placed on parties seeking to invoke the procedure, of demonstrating the propriety of convening an arbitration in the first place.

The better rule in the wake of Kaplan demands that the arbitrator not convene an ex parte arbitration unless the arbitration is the product of a 9 U.S.C. § 4 order to compel arbitration which the other party then proceeds to ignore. Any contrary procedure is violative of basic principles of arbitral law, as set out in the Act and as announced by this Court. Petitioner urges the Court to take this next step after Kaplan and grant his Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals. The importance of this issue to the proper and equitable functioning of the federal arbitration system demands no less.

CONCLUSION

Therefore, and for all the foregoing reasons, petitioner David L. McLeland respectfully requests that this Court issue a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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